

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

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IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO.29864-g41G BY WILLIAM F. MCNULTY)

* * * * *

The time period for filing exceptions to the Hearing Examiner's Proposal for Decision has expired. No exceptions or other arguments were filed by any parties of record. The Department accepts and adopts the Findings of Fact and Conclusions of the Hearing Examiner as contained in his Proposal for Decision, except as explicitly modified or added to herein, and incorporates them herein by reference.

AMENDMENTS TO FINDINGS OF FACT

The Findings of Fact contained in the Proposal for Decision are hereby extended to include the following additional Finding of Fact:

8. The Applicant has established by substantial credible evidence the existence of MCA § 85-2-311 statutory criteria for granting a beneficial water use permit.

AMENDMENTS TO PROPOSED ORDER

The Proposed Order is hereby restated for purposes of clarification. The only substantive change is the inclusion of an additional standard permit condition which sets forth the Department's revocation powers. The modified Proposed Order is hereby entered as the Final Order as follows:

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FINAL ORDER

1. Provisional Permit No. 29864-g41G is hereby issued to William F. McNulty to appropriate 275 gallons per minute up to 87 acre-feet per year from groundwater withdrawn through an approximately 300 foot-deep well. The point of diversion, the well, is located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 32, Township 2 North, Range 4 West, M.P.M., Jefferson County. The waters diverted pursuant to this permit shall be used for sprinkler irrigation on 36 acres in the S $\frac{1}{2}$ NE $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$ and SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 32, Township 2 North, Range 4 West, M.P.M., Jefferson County.
2. The period of appropriation shall be April 1 to October 31, inclusive, of each year.
3. The priority date of the application shall be October 15, 1980, at 11:10 a.m..
4. This permit is issued subject to all prior existing water rights and any final determination of those rights, as provided by Montana Law.
5. The issuance of this Provisional Permit by the Department shall not reduce the Permittee's liability for damages caused by the Permittee's exercise of this Permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this Provisional Permit.

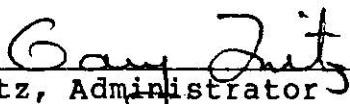
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6. If at any time after this permit is issued, a written complaint is received by the Department alleging that the Permittee's diverting of water from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Permittee to show cause why the permit should not be revoked or modified. The Department may revoke or modify the permit to protect existing rights or allow the permit to continue unchanged if the Department, on the basis of the hearing, determines that no existing water rights are being adversely affected. MCA § 85-2-314.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act, by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 14th day of November 1983.



Gary Fritz, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
32 South Ewing, Helena, MT 59620
(406) 444 - 6605

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AFFIDAVIT OF SERVICE

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on November 14, 1983, she deposited in the United States mail, First class mail, an order by the Department on the Application by William F. McNulty, Application No. 29864-g41G, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. William F. McNulty, P.O. Box 541, Whitehall, MT 59759
2. Rhinhold & Eilene Bieber, Box 205, Whitehall, MT 59759
3. Glen & Irene LaVigne, Box 13, Whitehall, MT 59759
4. Robert G. Strozzi, Box 572, Whitehall, MT 59759
5. Glen A. & Beth Stevens, Rt. 1, Box 1368, Whitehall, MT 59759
6. Harold Yde, Box 1372, Rt. 1, Whitehall, MT 59759
7. T.J. Reynolds, Helena Field Office (inter-department mail)
8. Scott Compton, Hearing Examiner (inter-department mail)
9. Peggy Elting, Water Rights Bureau (inter-department mail)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna K. Elser

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 14th day of November, 1983, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Judy Lohr
Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission expires 3-1-85

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STATEMENT OF THE CASE

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the SE1/4 and NE1/4 of Section 32 of Township 2 North, Range 4 West, all in Jefferson County. The source of supply is to be groundwater withdrawn through an approximately 300 feet deep well located in the SE1/4 SW1/4 NE1/4 of Section 32, Township 2 North, Range 4 West, all in Jefferson County.

2. The pertinent portions of this application were published for three successive weeks on March 19 and 26, and April 2, 1981, in the Madisonian, a newspaper of general circulation printed and published in Virginia City, Montana, and in the Montana Standard, on July 22, 29 and August 5, 1981, a newspaper of general circulation printed and published in Butte, Montana.

3. On August 25, 1981, an objection was received by the Department to the granting of this application by Glen and Irene LaVigne. Their objection alleges that the water table is lowering in the area and that this proposed appropriation would further affect the groundwater level in their well and drastically cut their water supply. The LaVignes did not appear at the hearing personally but were represented by Mr. Glen Stevens.

4. On August 21, 1981, an objection was received by the Department to the granting of this application by Robert G. Strozzi. His objection alleges, generally, that there are insufficient waters in the source of supply to allow this appropriation. Mr. Strozzi did not appear at the hearing in person or by a representative.

5. On August 19, 1981, an objection was received by the

Department to the granting of this application by Glen and Beth Stevens. Their objection states a concern for the level of the water table in the area and specifically in their well. Mr. Glen Stevens appeared at the hearing in person and on behalf of Mr. and Mrs. LaVigne.

6. On September 14, 1981, an untimely objection was received by the Department to the granting of this application by Rhinhold and Eilene Bieber. Their objection generally alleges that the proposed appropriation could draw down the water level in their well. The Biebers did not appear at the hearing personally or by representative.

7. At the beginning of these proceedings, Harold Yde asked to intervene in this hearing as an objector. Mr. Yde did not receive notice of these proceedings and claims to be a successor in interest of property and water rights previously owned by Mr. Glen Stevens in the vicinity of the proposed well. The Applicant did not object to allowing Mr. Yde to intervene in this matter and ask questions.

Based on the information in the Department's file in this matter and the information presented at the hearing, the Hearing Examiner hereby makes the following Proposed Findings of Fact, Conclusions of Law, and Order:

PROPOSED FINDINGS OF FACT

The Department of Natural Resources and Conservation has jurisdiction over the subject matter herein and over the parties hereto, whether they have appeared or not.

1. The Applicant has a bona fide intent to appropriate water.

2. The proposed use is for irrigation of grass or hay, which is a beneficial use.

3. The proposed means of diversion, construction, and operation are adequate.

4. No other permits or water reservations are on record that may be adversely affected.

5. There is water available for appropriation in the amount the Applicant seeks during the times the Applicant seeks to use it.

6. The application is for less than 10,000 acre-feet per year and under 15 cubic feet per second.

7. The amount of water applied for is reasonable. 7.6 gallons per minute per acre and 2.4 acre-feet per acre are reasonable and realistic flow and volume figures for sprinkler irrigation in the climatic area of the proposed place of use of the water.

PROPOSED CONCLUSIONS OF LAW

1. Montana Code Annotated 85-2-311(1981) directs the Department of Natural Resources and Conservation to issue a water use permit if the following conditions or criteria exist:

(1) There are unappropriated waters in the source of supply:

(a) at times when the water can be put to the use proposed by the applicant;

(b) in the amount the applicant seeks to appropriate;

and

(c) throughout the period during which the applicant seeks to appropriate, the amount requested is available;

(2) the rights of a prior appropriator will not be adversely affected;

(3) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(4) the proposed use of water is a beneficial use;

(5) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved;

(6) an applicant for an appropriation of 10,000 acre-feet a year or more and 15 cubic feet per second or more proves by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected;

(7) except as provided in subsection (6), the applicant proves by substantial credible evidence the criteria listed in subsections (1) through (5).

2. Pursuant to this section, the Department has jurisdiction over the subject matter and the parties involved.

3. The Applicant has a bona fide intent to put the water to a beneficial use by irrigating 36 acres in the SE1/4 and NE1/4 of Section 32, Township 2 North, Range 4 West, from a groundwater well to be located in the SE1/4 SW1/4 NE1/4 of Section 32, Township 2 North, Range 4 West, all in Jefferson County, Montana. The amount proposed for use in the irrigation of said land is 275 gallons per minute up to 87 acre-feet per year from April 1 to October 31, inclusive, of each year.

4. Evidence entered into the record in the form of a groundwater report prepared by Debra Hanneman of the Department and testimony by herself at the proceedings tend to show that there are unappropriated waters in the source of supply and, further, that there should be little or no affect on any of the Objectors's wells from the proposed appropriation. The

Objectors, Mr. Glen Stevens, the LaVignes, and Mr. Harold Vde, presented their personal concerns and views but no evidence or testimony on the unavailability of water from the source of supply as applied for. The Applicant, Mr. William McNulty, testified that the overall irrigation plan would be to irrigate said land by a computer controlled system between the hours of 1 a.m. and 5 a.m. as necessary to fulfill the crop requirements. This type of irrigation plan will help to alleviate stress on the aquifer involved.

PROPOSED ORDER

WHEREFORE, based on the Proposed Findings of Fact and Conclusions of Law, the following Proposed Order is issued:

1. Application for Beneficial Water Use Permit No. 29864-g41G by William F. McNulty is hereby granted as applied for before the Department of Natural Resources and Conservation.
2. This permit is issued subject to existing water rights and any final determination of those rights as provided by Montana Law.
3. The issuance of this Provisional Permit by the Department shall not reduce the Permittee's liability for damages caused by the Permittee's exercise of this Permit, nor does the Department in issuing the Provisional Permit in any

way acknowledge liability for damage caused by the Permittee's exercise of this Provisional Permit.

NOTICE

This Proposal for Decision is offered for the review and comment of all parties of record. Written objections or exceptions to this Proposed Order must be filed with and received by the Department of Natural Resources and Conservation on or before April 27, 1983.

NOTE this 7th day of April, 1983.

Scott Compton
Scott Compton, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 449 - 3962

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AFFIDAVIT OF SERVICE
PROPOSAL FOR DECISION

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Cheryl L. Wallace, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 7, 1983, she deposited in the United States mail, certified return receipt mail, an order by the Department on the Application by William F. McNulty, Application No. 29864, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. William F. McNulty, P.O. Box 541, Whitehall, MT 59759
2. Rhinhold & Eilene Bieber, Box 205, Whitehall, MT 59759
3. Glen & Irene LaVigne, Box 13, Whitehall, MT 59759
4. Robert G. Strozzi, Box 572, Whitehall, MT 59759
5. Glen A. & Beth Stevens, Rt. 1, Box 1368, Whitehall, MT 59759
6. T.J. Reynolds, Helena Field Office (inter-department mail)
7. Scott Compton, Hearing Examiner (inter-department mail)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Cheryl L. Wallace

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 7th day of April, 1983, before me, a Notary Public in and for said state, personally appeared Cheryl L. Wallace, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Judy L. Lohr
Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission expires 3/1/85

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